IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROLANDO BELTRAN,	§	
Plaintiff	§	
	§	
v.	§	**C.A. No. 5:15-CV-1019-RP**
	§	
UNION PACIFIC RAILROAD COMPANY,	§	
	§	
Defendant	§	

DEFENDANT UNION PACIFIC RAILROAD COMPANY'S
FIRST SUPPLEMENT TO ITS MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF THE COURT:

NOW COMES Defendant, Union Pacific Railroad Company ("Union Pacific") and, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, respectfully supplements its motion for summary judgment and would show the court as follows:

I.
GENERAL BACKGROUND

On December 21, 2016 the Court ordered Union Pacific Railroad Company ("Union Pacific") to arrange for testing of the remaining sample of Rolando Beltran's urine sample recovered November 20, 2014. (Doc. 43).

On December 22, 2016, Union Pacific advised counsel for both Quest Laboraties and Clinical Reference Laboratory to proceed with the testing requested by Plaintiff and ordered by the Court. (Doc. 44).

Testing, as ordered, was completed on January 13, 2017. **EXHIBIT A**.

Plaintiff's sample has again tested positive for Amphetamine/Methamphetamine. **EXHIBIT A**.

Union Pacific Terminated Plaintiff's Employment for a Legitimate, Non Discriminatory Reason: His Failed Drug *Test.*

As a common carrier, Union Pacific follows certain federal drug-testing standards and bears a duty to obey federal laws and regulations for positive drug tests from its employees.[1] Union Pacific also enforces a company-wide prohibition on the use of illegal substances by its employees.[2]

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[1] (1) Drug and alcohol testing in the railroad industry must comply with DOT and FRA regulations and procedures. 49 C.F.R. Part 219; 49 C.F.R. Part 40; *see also* 49 C.F.R. § 219.701(a) (Drug testing must be conducted in compliance with Part 40).

(2) Under the Federal Railroad Administration ("FRA"), "No employee who performs covered service may use a controlled substance at any time, whether on duty or off duty, except as permitted by § 219.103." 49 C.F.R. § 219.102; 49 C.F.R. § 219.103 (governing prescription and over-the-counter drugs).

(3) Upon receipt of a verified positive test result, Union Pacific is required to immediately remove an employee from covered service/safety sensitive functions. 49 C.F.R. §§ 219.104(a)(1) ("If the railroad determines that an employee has violated § 219.01 or § 219.02, or the alcohol or controlled substances misuse rule of another DOT agency, the railroad must immediately remove the employee from covered service . . . "); 49 C.F.R. § 219.605(b); *see also* 49 C.F.R. §40.23(a) . Union Pacific is also expressly prohibited from permitting the employee to return to service/perform safety-sensitive functions unless he complied with the return-to-service and follow-up testing requirements, including a negative drug test result. 49 C.F.R. § 219.104(a) & (d); *see also* 49 C.F.R. §§ 40.305(a) & (b), 40.23(d).

(4) The FRA also imposes a duty on Union Pacific to prevent violations. 49 C.F.R. § 219.105(a) ("A railroad may not, with actual knowledge, permit an employee to go or remain on duty in covered service in violation of the prohibitions of § 219.101 or § 219.102.").

(5) Indeed, under the FRA, Union Pacific is subject to civil penalties if it does not comply with its provisions. 49 C.F.R. § 219.9(a) ("Any person . . . [including a railroad] . . . that violates any requires of this part or causes the violation of any such requirement is subject to a civil penalty of at least $839 and not more than $27,455 per violation . . . ."); (Part 219 Appendix A) (containing civil penalty schedule for violations, including failure to remove employee from covered service immediately, an employee improperly returned to service, or employee improperly returned to service).

(6) Under DOT regulations, Union Pacific has no ability to alter or change the verified positive test result reported to it. 49 C.F.R. § 40.23(i). The determination of whether there is a legitimate medical explanation for a positive test result is solely the responsibility of the MRO. 49 C.F.R. §§ 40.123 (MRO duty to act as independent and impartial "gatekeeper" and advocate for the accuracy and integrity of the drug testing process and determine whether legitimate medical explanation for confirmed positive test results from laboratory), § 40.135 (verification interview), § 40.137 (verification of test results involving amphetamines), § 40.141, § 40.149 (MRO's ability to change a verified drug test result).

(7) The MRO is a separate and distinct legal entity from Union Pacific. 49 C.F.R. § 40.135. Union Pacific is expressly prohibited from altering drug test results transmitted by the MRO. 49 C.F.R. § 40.23(i); *see also id.* § 40.167(e) ("MRO reports are not subject to modification or change by anyone other than the MRO, as provided in §40.149(c)").

[2] *See*, Affidavit of Penny Lyons, attached as Exhibit A to Defendant's Reply to Plaintiff's Motion for Re-Testing of Remaining Split Sample Specimen (Doc. 18).

In this matter, Plaintiff voluntarily agreed to be randomly drug-tested over the course of 60-months as a condition of his reinstatement in 2011. On November 20, 2014, Plaintiff provided a urine sample that has now been tested three (3) times, most recently including testing in every form Plaintiff has requested. His urine clearly was positive for contraband in violation of company policy, his agreement for resinstatement, and federal law.

Union Pacific removed Plaintiff from service and subsequently terminated him after a formal investigation hearing was held where no satisfactory explanation was given for the results. Failure of Plaintiff to abide by the company rules and the conditions of his reinstatement is a legitimate, non-discriminatory reason for his termination. Aside from this explicit contractual provision, Union Pacific's adherence to federal regulations that mandate drug testing results for railroad employees is also a legitimate, non-discriminatory reason for the adverse employment actions. Moreover, court precedent is replete with decisions where a violation of a company rule on the consumption of illegal substances has been found to be a legitimate, non-discriminatory reason for an employee termination.[3]

Plaintiff states that the only discrimination event he is claiming is his termination on January 9, 2015. For that event, Plaintiff failed a drug test and Union Pacific acted accordingly. Plaintiff has failed to demonstrate, in any way, that this action taken by

[3] *See Grooms v. Wiregrass Elec. Co-op., Inc.*, 877 F.Supp. 602 (M.D.Al. 1995)(where under federal law, employer was required to do mandatory drug testing of employees, holding that employer acted appropriately in suspending employee); See also *Young v. Chicago Transit Authority*, 189 F. Supp.2d 780, 789 (N.D. Ill 2002)(Where court found that Plaintiff presented no evidence that employer failed to follow its drug testing and policy procedures and applied them in a discriminatory manner towards plaintiff); See also *Brown v. Triboro Coach Corp.*, 153 F. Supp.2d 172 (E.D.N.Y. 2001)(where plaintiff did not come up with sufficient evidence to cast doubt on employers non-discriminatory reason for termination-a second positive drug test); See also *Bailey v. Real Time Staffing Serv., Inc.*, 543 Fed.Appx. 520 (6th Cir. 2013)(where plaintiff could not overcome employers legitimate reason for termination-failed drug test); See also *Tatum v. City of Berkely*, 408 F.3d 543 (8th Cir. 2005)(where plaintiffs could not overcome City's legitimate reason for terminating them-their undisputed use of illegal drugs).

Union Pacific was discriminatory in nature, other than his own conclusory allegations. His burden has not been met with either circumstantial or direct evidence of discrimination. Indeed, the cold, hard facts demonstrate Union Pacific has acted as a responsible employer. Plaintiff's discrimination claims must fail as a matter of law.

V.
PRAYER

Plaintiff has failed to establish even a *prima facie* claim of discrimination. Plaintiff was terminated for the legitimate, non-discriminatory reason that he failed a federally mandated drug test and under the applicable law his termination is wholly appropriate. This case should be dismissed.

Respectfully submitted,

Union Pacific Railroad Company

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2017 a copy of the foregoing instrument was served by Electronic e-file and/or certified mail return, receipt, requested on:

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